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International Union of Operating Engineers, Local 627 and Stacy M. Loerwald. Case 17-CB-072671

November 5, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On April 17, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 91. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Tenth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.¹ Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 91, which is incorporated herein by reference. The judge's recommended Order, as further modified herein, is set forth in full below.²

¹ In concluding that the Respondent's conduct violated Sec. 8(a)(3) and (1) under *Wright Line*, we rely on *Mesker Door Inc.*, 357 NLRB No. 59, slip op. at 2 (2011).

² In adopting paragraph 2(d) of the above Order, we rely on *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 3 fn. 12 (2014) (stating that a respondent that has never been an employer of the discriminatee is subject to the tax-compensation remedy but not the Social Security reporting requirement).

We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Operating Engineers, Local 627, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing requests from Stacy M. Loerwald or other applicants for employment to examine the out-of-work referral list.

(b) Removing Loerwald or any qualified applicant for employment from its out-of-work referral list for arbitrary or discriminatory reasons.

(c) Refusing to re-register Loerwald or any other qualified applicant for employment to his or her rightful place on the out-of-work referral list for arbitrary or discriminatory reasons.

(d) Causing or attempting to cause any employer that is signatory to its collective-bargaining agreement to refuse to hire Loerwald or any other qualified applicant for discriminatory or arbitrary reasons.

(e) Refusing to stamp the Oklahoma Employment Security Commission work search book of any applicant for employment for arbitrary or discriminatory reasons.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant Stacy M. Loerwald's requests to examine the out-of-work referral list. In addition, if the versions of the out-of-work lists as they existed on the dates she requested to see them are saved or retrievable in any form, permit her to examine the lists as they existed on any and all of those dates.

(b) Within 14 days from the date of this Order, restore Stacy M. Loerwald to the out-of-work list in her rightful order of priority.

(c) Make Stacy M. Loerwald whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Loerwald for any adverse income tax consequences of receiving her backpay in one lump sum.

(e) Within 14 days from the date of this Order, remove from its files any reference to Stacy M. Loerwald's removal from the out-of-work referral list, and within 3 days thereafter, notify her in writing that this has been done and that her removal from the list will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring-hall referral

records, payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its offices, hiring halls, and any other relevant facilities in Oklahoma City and Tulsa, Oklahoma, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 14 days after service by the Region, deliver to the Regional Director for Region 17 signed copies of the notice in sufficient number for posting by employers signatory to the collective-bargaining agreement, if they wish, in all places where notices to employees are customarily posted at their facilities within the area served by the Respondent.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 5, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
MEMBER MISCIMARRA, concurring.

I agree with the judge's rulings, findings, and conclusions for the reasons stated in the judge's decision; I

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agree with my colleagues' reliance on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 3 fn. 12 (2014), regarding the remedy; and I join in issuing the Order set forth above. As to the analysis applied by the judge pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I would adhere to the formulation I described in *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 fn. 1 (2014) (Member Miscimarra, concurring). Accordingly, I concur.

Dated, Washington, D.C. November 5, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide applicants for employment, upon request, the opportunity to examine the out-of-work referral list.

WE WILL NOT remove applicants for employment from the out-of-work referral list, or refuse to permit them to register on the list, for arbitrary or discriminatory reasons.

WE WILL NOT cause or attempt to cause any employer to discriminate against employees seeking referrals for employment.

WE WILL NOT refuse to stamp the Oklahoma Employment Security Commission work search book presented to us by any applicant for employment for arbitrary or discriminatory reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL grant Stacy M. Loerwald's requests to examine the out-of-work referral list.

WE WILL, within 14 days from the date of the Board's Order, restore Stacy M. Loerwald to the out-of-work referral list in her rightful order of priority.

WE WILL make Stacy M. Loerwald whole for any loss of earnings and other benefits resulting from our removal of her from, and our refusal to reinstate her to, the out-of-work referral list, less any net interim earnings, plus interest.

WE WILL compensate Loerwald for any adverse income tax consequences of receiving her backpay in one lump sum.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Stacy M. Loerwald's removal from the out-of-work referral list, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that her removal from the list will not be used against her in any way.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627

The Board's decision can be found at www.nlr.gov/case/17-CB-072671 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington 20570, or by calling (202) 274-1940.

